United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

2-13-75

74-2360

To Be Argued By:
JOHN D. FEERICK

United States Court of Appeals
FOR THE SECOND CIRCUIT

AERONAVES DE MEXICO, S.A.,

Plaintiff-Appellant,

—against—

TRIANGLE AVIATION SERVICES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (BRIEANT, J.)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Aeronaves de Mexico, S.A., plaintiff-appellant, ("Aeromexico") submits this brief in reply to the brief of Triangle Aviation Services, Inc., defendant-appellee, ("Triangle").

When all of the rhetoric and categorical statements contained in Triangle's brief are stripped away, there is no support whatsoever for Triangle's position that the November 16, 1973 contract between the parties

(the "Contract") (A-6 to 26)* empowers an arbitrator to fix a price for servicing Aeromexico's DC-10 aircraft. By the use of caustic language, the posing of irrelevant hypotheticals, and the citation of more than fifty cases, Triangle attempts to blur the critical language of paragraph 3-3 that price increases for servicing a change in aircraft, the DC-10, are to be "negotiated to the satisfaction of both parties" (A-10).

Triangle also tries to evade its responsibility for drafting the Contract by erroneously stating that "there are no facts here with respect to who is responsible" for the Contract (Triangle Brief, p. 16). The record is clear that Triangle bears the draftsman's responsibility (A-75, 87) and accordingly, ambiguities, if any, must be resolved against Triangle.

The cases cited by Triangle establish that an agreement to arbitrate a claim will not be implied but rather must be spelled out by clear and unambiguous language. Aeromexico submits that the express language used in the Contract does not provide for arbitration of the claims sought to be arbitrated by Triangle in its Demand for Arbitration (A-32).

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* This and all similar references are to pages in the Appendix.

In order to avoid Aeromexico's contention that the parties used language in paragraph 3-3 that clearly excludes the arbitration of price increases, Triangle seeks to convey the impression that there are questions of interpretation presented in the instant case concerning whether there was in fact a price increase and whether the parties in fact negotiated. However, an examination of Triangle's Demand for Arbitration makes clear that no such questions are involved. Indeed, Triangle concedes as much at page 23 of its brief:

> "We are concerned, rather, with whether the parties agreed to arbitrate price increases, and whether Aeromexico's dissatisfaction with the price asked by Triangle ends the matter or constitutes, as we say it does, the starter which turns on the arbitration engine. It is not Aeromexico's dissatisfaction that is here being challenged -- it is what happens after that dissatisfaction has been expressed."

ARGUMENT

I

EXAMINATION OF PARAGRAPHS 3-3 AND 3-6 DEMONSTRATES THAT THE ISSUES RAISED BY TRIANGLE ARE NOT ARBITRABLE.

Triangle's brief makes frequent references to an alleged similarity between paragraphs 3-3 and 3-6 of the

Contract and argues that since it would be absurd for 3-6 issues not to be arbitrable it would be equally absurd for 3-3 issues not to be arbitrable (A-7, 13). This is a non sequitur. Triangle's comparison between paragraphs 3-3 and 3-6 completely ignores the fact that the words "negotiated to the satisfaction of both parties", found only in paragraph 3-3, are in direct contravention of arbitration. Thus, Triangle brushes off the significance of the phrase quoted above by stating that it is in effect meaningless (Triangle Brief p. 13).

As we shall demonstrate below, each of these paragraphs, i.e., 3-3 and 3-6, (i) deals with entirely different eventualities and (ii) uses significantly different language with respect to potential price increases.

A. Paragraphs 3-3 and 3-6 Deal With Entirely Different Eventualities.

The eventualities which may lead to price increases under paragraph 3-3 (the one involved in this appeal) arise from the action of the parties to the Contract. Under the Contract, Aeromexico may change its operations in certain specified ways: volume of flights, types of aircraft, arrival/departure times, and cargo load factors. In such event, if Triangle determines to use additional manpower and equipment, "an increase in the

charges will be negotiated to the satisfaction of both parties" (A-10). Thus, the parties themselves control the eventualities which might lead to negotiations under paragraph 3-3.

Paragraph 3-6, on the other hand, deals with price increases precipitated by eventualities which the parties themselves do not control. These eventualities are determined by third parties and involve labor-related costs such as increased employer contributions to social security, unemployment and disability insurance; increases under collective bargaining agreements, and other charges required by law. Plainly, such changes are external to the relationship between the parties to the contract and are ascertainable with mathematical certainty.

Finally Paragraph 3-3 deals with major corporate decisions, i.e., changes in aircraft types, volume of flights, arrival/departure times, and cargo load factors. The results of these decisions, unlike the changes under 3-6, are not capable of measurement with any degree of mathematical certainty.

B. Paragraphs 3-6 and 3-3 Use Significantly Different Language.

Although this Court is not concerned with the arbitrability of a matter falling within 3-6, the language of that

paragraph when contrasted with that of 3-3, sheds significant light on the express intent of the parties with respect to the non-arbitrability of the 3-3 issue involved in this appeal.

Paragraph 3-6 provides that in the event of a labor-related cost increase, the parties "shall negotiate revision in the Basic Charge so as to include said increased cost resultant therefrom" (A-11). By way of contrast, paragraph 3-3 provides that "an increase in the charges will be negotiated to the satisfaction of both parties upon ten (10) days notice to AIRLINE" (A-10). Plainly, by using different language in different sections involving different eventualities, the parties intended to achieve different results. By stating in 3-3 that both parties must be satisfied before any price increase could be effective, the parties expressly provided that the result of such negotiations reflect their subjective judgments.

Literal effect should be given to language providing for the satisfaction of one or both parties when the issues involved concern matters of individual judgment. Wynkoop Hallenbeck Crawford Company v. Western Union Telegraph Company, 268 N.Y. 108, 112-13, 196 N.E. 760 (1935). In addition, when there has been no performance and no unjust enrichment, a contract that calls for the satisfaction of the parties should not be rewritten:

"When literal construction is rejected in cases like this, the reason is usually some consideration of hardship or of unjust enrichment." 268 N.Y. at 113.

As stated in our main brief at pages 10 and 11, no issue could involve a greater degree of individual judgment than that involved in this case. In addition, there has been neither performance by Triangle nor unjust enrichment to Aeromexico.

We submit that the proper interpretation of paragraph 3-3 is that the parties intended to reserve the determination of price increases to themselves and not to relegate this decision to a third party. In refusing to give effect to the plain, express intent of the parties, the Court below read out of 3-3 the satisfaction language which was carefully set forth in that paragraph. Surely, if the parties had intended arbitration, Triangle, as the draftsman of the contract, could easily have provided for it by indicating that in the event of a breakdown in negotiations, an arbitrator would be empowered to establish the price.

C. The Fallacy of Triangle's Argument That, Without Arbitration, It Is Left To Aeromexico's "Mercy"

Triangle urges that, without arbitration, it would be left at the complete mercy of Aeromexico since,

it suggests, Aeromexico would be able to back out of the Contract by creating a contrived issue (Triangle Brief, p. 15). Let us examine this contention.

To start with, the items embraced by 3-3 involve changes in aircraft types, flight times, volume of flights and cargo load factors. These are matters involving the financial resources of the Company, CAB and FAA rules and regulations, and the convenience of the flying public. Can one imagine an airline substituting millions of dollars worth of equipment in order to escape this Contract? Similarly, can one imagine an airline inconveniencing its passengers and jeopardizing its competitive position with other airlines by changing flight schedules or increasing its cost by unnecessarily adding flights simply to avoid this Contract? Thus, Triangle's argument is sheer nonsense.

Secondly, even if Aeromexico were to go to such trouble and expense by substituting aircraft types or changing its schedules, Triangle could defeat any such ulterior motives of Aeromexico by failing to seek a price increase under paragraph 3-3.

Therefore, it is obvious that Triangle is not at the mercy of Aeromexico. Any changes by Aeromexico referred to in paragraph 3-3 would be governed entirely

by economic and competitive conditions and not by any desire by Aeromexico to avoid the Contract.

From an examination of the differences in the eventualities contemplated by 3-3 and 3-6 and the language of the two paragraphs, it is clear that the parties intended to negotiate prospective price increases and did not intend to leave the fixing of a price for servicing the DC-10 to third parties. To read this language any other way would violate the cardinal rule of construction that a court should not adopt an interpretation which will operate to leave a provision of a contract without force and effect. Corhill v. S. D. Plants Inc., 9 N.Y.2d 595, 217 N.Y.S.2d 1 (1961).

II

THE INAPPLICABILITY OF THE CASES CITED BY TRIANGLE

While Triangle cites an imposing number of cases, most are cited for self-evident propositions which have no relevance to the issues before this Court. Aeromexico certainly does not disagree with the proposition that "a dispute is not arbitrable if it is grounded on an asserted interpretation of the agreement contrary to unambiguous

provisions thereof" (Triangle Brief. p. 27); nor that the parties to a contract "are presumed to act sensibly" nor that "a reasonable interpretation . . . must be given" to a contract (Triangle Brief, pp. 15, 16).

The lower court in its memorandum opinion and Triangle in its brief rely heavily on American Home Assurance Co. v. American Fidelity and Casualty Co., 356 F.2d 690 (2d Cir. 1966) (A-94; Triangle Brief at 22-23).

As we pointed out in our main brief, that case is wholly inapposite. We should emphasize that American Home involved a contract provision which was entirely different from the one in this case. In the American Home case the provision sought to be arbitrated was held by the court to be such that an arbitrator could find that, in the absence of "other arrangements", the parties had agreed to reinstate a previously agreed upon premium rate. The parties to this action, on the other hand, provided in paragraph 3-3 that "an increase in the charges will be negotiated to the satisfaction of both parties" (A-10). There is no previously agreed upon price to be reinstated and no grant of authority to an arbitrator to set a price.

In fact, the question of servicing Aeromexico DC-10's had been raised by Triangle prior to the signing of the Contract (A-85, 86) and yet was specifically and

intentionally omitted from the Contract. Triangle itself admits that "at that time [the time of making the Contract], Aeronaves did not have the DC-10's in operation and it was still not definitely decided, so far as we knew, that they would be in operation. Accordingly, no reference thereto was made in the contract with Aeronaves, but, of course, there were the provisions for changes in schedules, and, more particularly express provisions for changes in aircraft type" (A-75).

Additionally, the party resisting arbitration in American Home had received a benefit under the reformed contract for a period of six years prior to the demand for arbitration. Although Triangle insists that this is irrelevant to the issue now before the Court (Triangle Brief, p. 23), the Court in American Home considered it significant that the demand for arbitration included a controversy over the period for which appellant had been receiving benefits under the modified contract. Aeromexico, on the other hand, has received no benefits under the Contract in the instant case, since Triangle has performed no services with respect to Aeromexico's DC-10's.

Accordingly, the cases cited by Triangle do not support its contention that Aeromexico must arbitrate the issues raised in the Demand for Arbitration (A-32).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the District Court and direct the District Court to enter judgment that (1) Aeromexico is not obligated to deal with Triangle with reference to servicing its DC-10 aircraft; (2) no arbitrable issue exists under the Contract; and (3) Triangle be enjoined from proceeding with its Demand for Arbitration.

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New York, New York

Respectfully submitted,

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